Zulkifle bin Sabarudin v Fauziah bte Arshad (Arifah bte Arshad, Third Party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–206 OF 2003
ABDUL MALIK ISHAK J
24 MAY 2005

Civil Procedure — Third parties — Third party notice — Whether filed within scope of O 16 r 1 of the Rules of the High Court 1980 — Whether there was a question proper to be tried as to claim for contribution from third party — Rules of the High Court 1980 O 16 r 1

The learned Senior Assistant Registrar ('SAR') had allowed the third party's application to strike out the third party notice issued by the defendant. Aggrieved by the decision of the SAR, the defendant appealed to the judge in chambers. It was contended by the plaintiff that the defendant had sold to him a piece of property ('the said property') by way of an agreement. It was also contended by the plaintiff that the defendant had failed to honour the said agreement in that at the time the said property was about to be transferred to him, he had discovered that a private caveat was lodged on the said property wherein it was alleged that the defendant had in fact sold the said property to the caveator. The caveator was the third party. The plaintiff sought a full refund of all the monies which he had paid to the defendant. It was part and parcel of the defendant's defence that she did not enter into an agreement to sell the said property to the third party.

Held, dismissing the appeal:

(1) The defendant was contractually bound by the terms and conditions as stated in the sale and purchase agreement between the defendant and the third party for the sale of the said property. The failure on the part of the defendant to communicate her purported intention to terminate the sale and purchase agreement between the defendant and the third party and to refund the deposit and part payment of the purchase price to the third party was an indication that the defendant intended to proceed with the completion of the sale and purchase agreement (see para 34).

(2) The third party had no knowledge of the contract between the defendant and the plaintiff. The same would also be true for the plaintiff. The plaintiff did not know of the existence of the previous contract between the defendant and the third party. In such a situation, it would be difficult to relate the issue in the main suit filed by the plaintiff to the third party. To aggravate the matter further, all the documents showed that the defendant had never disclosed the identity of the third party to the plaintiff and vice versa (see para 47).

(3) The duty on the part of the defendant was onerous. The defendant had to prove to the court that the third party notice was filed within the scope of O 16 r 1 of the Rules of the High Court 1980 ('RHC'). In the context of O 16 of the RHC, the defendant had to satisfy the court that there was a question proper to be tried as to the claim for contribution from the third party as required under the provisions of the RHC. There was a failure on the part of the defendant to prove a prima facie case against the third party. The defendant too had failed to prove the existence of any connection between the plaintiff and the third party as well as the existence of any knowledge on the part of the third party in regard to the suit filed by the plaintiff or the transaction entered into between the defendant and the plaintiff (see para 48).

[**Bahasa Malaysia summary**

Penolong Kanan Pendaftar ('SAR') telah membenarkan permohonan pihak ketiga untuk menolak notis pihak ketiga yang dikeluarkan oleh defendan. Terkilan oleh keputusan SAR, defendan telah merayu kepada hakim dalam kamar. Plaintif menyatakan bahawa defendan telah menjual sebuah harta ('harta itu') melalui satu perjanjian. Plaintif juga menyatakan bahawa defendan telah gagal memenuhi perjanjian itu dan apabila sampai pada masa harta dipindah kepada beliau, beliau mendapati bahawa terdapat satu kaveat persendirian di atas harta itu di mana ia mengatakan bahawa defendan telah menjual harta itu kepada kaveator. Kaveator adalah pihak ketiga. Plaintif menuntut pembayaran balik sepenuhnya akan kesemua jumlah yang telah dibayar kepada defendan. Adalah sebahagian daripada pembelaan defendan bahawa beliau tidak memasuki perjanjian untuk menjual harta itu kepada pihak ketiga.

Diputuskan, menolak rayuan itu:

(1) Defendan diikat secara kontrak oleh terma-terma dan syarat-syarat seperti yang dinyatakan dalam perjanjian jual beli di antara defendan dan pihak ketiga untuk penjualan harta itu. Kegagalan defendan untuk menyatakan tujuannya untuk menamatkan perjanjian jual beli itu diantara defendan dan pihak ketiga dan melakukan pembayaran balik deposit dan bayaran sebahagian harga belian kepada pihak ketiga adalah menunjukkan bahawa defendan bertujuan meneruskan dengan perjanjian jual beli itu (lihat perenggan 34).

(2) Pihak ketiga tiada pengetahuan mengenai kontrak di antara defendan dan plaintif. Ini adalah sama dengan plaintif. Plaintif tidak tahu sama ada wujud kontrak di antara defendan dan pihak ketiga sebelum ini. Dalam situasi seperti ini, ia adalah susah untuk mengaitkan isu dalam guaman utama yang difailkan oleh plaintif dengan pihak ketiga. Untuk menyusahkan perkara lagi, semua dokumen-dokumen menunjukkan bahawa defendan tidak pernah membongkar identiti pihak ketiga kepada plaintif atau sebaliknya (lihat perenggan 47).

(3) Tanggungjawab defendan adalah berat. Defendan mesti membuktikan kepada mahkamah bahawa notis pihak ketiga telah difailkan di dalam lingkungan A 16 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam konteks A 16 KMT, defendan mesti memuaskan mahkamah bahawa terdapat persoalan yang patut dibicarakan mengenai tuntutan untuk penyumbangan daripada pihak ketiga seperti yang diperlukan oleh peruntukan KMT. Terdapat kegagalan pada pihak defendan untuk membuktikan kes *prima facie* terhadap pihak ketiga. Defendan juga gagal membuktikan kewujudan sebarang kaitan di antara plaintif dan pihak ketiga dan juga kewujudan sebarang pengetahuan pada pihak ketiga mengenai guaman yang difailkan oleh plaintif atau transaksi yang dimasuki di antara defendan dan plaintif (lihat perenggan 48).]

Notes

For a case on third party notice, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 6283.

Cases referred to

Chua Ngah Chin v Ng Kie En [1968] 1 MLJ 267 (refd)
Dato Seri Dr Mahathir bin Mohamad v Derek Davies & Anor [1989] 1 MLJ 52 (refd)
Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha (1935) LR 62 Ind App 100 (refd)
Eastern Shipping Co Ltd v Quah Beng Kee [1924] AC 177 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Hee Awa & Ors v Syed Muhammad Sazaly & Anor [1988] 1 MLJ 300 (refd)
Hong Leong Nominees Sdn Bhd & Anor v Tommy Lim Boon Cheow & Anor (Lachaman Lalchand & Associates, third party) [2000] 5 MLJ 96 (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (refd)
Lee Kuan Yew v Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties) [1993] 1 SLR 723 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53 (refd)
Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226 (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151 (refd)
Slade & Kempton (Jewellery) Ltd v Kayman Ltd [1969] 1 WLR 1285, [1969] 3 All ER 786 (refd)
Standard Securities Ltd v Hubbard & Anor [1967] 2 All ER 622 (refd)
Yap Hong Too & Anor v Wong Ah Mei & Anor [1997] 1 MLJ 545 (refd)

Legislation referre to

Civil Law Act 1956 s 10(1)(c)
Contracts Act 1950 ss 40, 56(1), 65

National Land Code s 323, (1)(a)
Rules of the High Court 1980 O 16 r 1
Rules of the Supreme Court [Eng] O XVL r 48

Gobind Singh Deo (Karpal Singh & Co) for the defendant.
Asmuni bin Awi (Awi & Co) for the third party.

Abdul Malik Ishak J:

INTRODUCTION

[1] On 21 September 2004, the learned Senior Assistant Registrar ('SAR') allowed the third party's application in encl 18 to strike out the third party notice issued by the defendant dated 31 July 2003 with costs. Aggrieved by the decision of the SAR, the defendant appealed to the judge in chambers as reflected in encl 36.

LEGAL SEMANTICS

[2] To add a third party, that third party must be one 'who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter' (per Lord Diplock in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 at p 55). In the words of Pennycuick J. in *Standard Securities Ltd v Hubbard & Anor* [1967] 2 All ER 622 at p 623:

> The objects of the rule are … to prevent multiplicity of actions and to enable the court to settle disputes between all parties to them in one action and to prevent the same question from being tried twice with possibly different results.

[3] It is entirely at the court's discretion whether to add a party as a co-defendant (*Hee Awa & Ors v Syed Muhammad Sazaly & Anor* [1988] 1 MLJ 300 (SC)). Order 16 of the Rules of the High Court 1980 ('RHC') should be referred to when one talks about a third party notice. Third party proceedings are independent proceedings between the defendant as the plaintiff and the third parties as the defendants (*Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC)). That being the case, third party proceedings may be dismissed for want of prosecution notwithstanding the existence of the action between the plaintiff and the defendant (*Slade & Kempton (Jewellery) Ltd v Kayman Ltd* [1969] 1 WLR 1285, [1969] 3 All ER 786).

[4] Before issuing a third party notice, the defendant must enter an appearance. And thereafter the defendant may issue a third party notice without the leave of the court provided the action proceeded by way of a writ and the defendant issues that third party notice before serving the defence onto the plaintiff. And leave of the court is necessary for the issuance of the

third party notice especially when the action is one begun by an originating summons or if the defendant has filed his defence and has served his defence onto the plaintiff.

[5] When there is a claim for contribution or indemnity, a third party proceedings is always ideal. Thus, once the third party has been served, he becomes a party to the action and it is just like as though he has been sued by the defendant. This must have been the trauma that the third party, in the present case, was undergoing when she was served with the third party notice. And so the third party here applied in encl 18 to strike out the third party notice issued by the defendant. She was successful and that explains the appeal of the defendant in encl 36.

THE PLAINTIFFS CLAIM

[6] It was contended by the plaintiff that the defendant had sold to him a piece of property by way of an agreement dated 25 June 2002. It was also contended by the plaintiff that the defendant had failed to honour the said agreement in that at the time the said property was about to be transferred to him, his solicitors discovered that a private caveat was lodged on the said property wherein it was alleged that the defendant had in fact sold the said properly to the caveator. In the context of the present case, the caveator here was none other than the third party.

[7] The plaintiff sought a full refund of all the monies which he had paid to the defendant to the tune of RM245,000. That was the monies that were paid under the contract. Then there was a sum amounting to RM10,040.18 being monies that were spent in respect of registration costs, stamping fees and legal fees. This would be followed by a sum that came up to RM24,500 which constituted as liquidated damages which was agreed by the parties pursuant to the said agreement in the event the transfer could not be effected to the plaintiff.

THE DEFENDANT'S DEFENCE

[8] It was part and parcel of the defendant's defence that she did not enter into an agreement to sell the said property to the third party in or about the month of July 2001 for the sum of RM250,000. It must be borne in mind that the third party is the defendant's sister.

[9] The defendant, however, admitted that she received a sum of RM80,000 from her sister — referring to the third party, in respect of the sale of the said property. The first payment was said to be on 11 June 2001 while the second payment took place on 12 July 2001.

[10] The defendant proceeded to say further that her sister — referring to the third party, did not prepare an agreement reflecting the actual terms of the

said agreement. Nor did the third party take any positive steps to put into effect the said agreement or make any further payment until 6 January 2003 by which time the third party had sent her a cheque amounting to RM60,000.

[11] It was contended by the defendant that the agreement that was subsequently produced by her sister — referring to the third party, was void because it stated the purchase price of RM150,000 instead of RM250,000 as agreed.

[12] A new issue was raised by the defendant and it went like this. That it was the case of the defendant that the agreement with her sister — referring to the third party, had lapsed and had terminated automatically as the third party had failed to make payment of the balance of the purchase price to the defendant within the time as stipulated as well as within the extended time period in accordance with the contract.

[13] Another new issue that was raised by the defendant was this. That it was the contention of the defendant that her sister — referring to the third party, had no right to caveat the said property which has resulted in the defendant being sued for damages by the plaintiff.

[14] I have more to say about these two new issues when I analysed the appeal in encl 36.

[15] The defendant also sought for an order that the said property which was now transferred into the name of her sister — referring to the third party, be returned to her because there was no lawful agreement in existence between her and her sister in respect of the sale of that property.

THE CASE FOR THE THIRD PARTY

[16] The contention of the third party was this. That the cause of action between the plaintiff and the defendant was separate and distinct and that the defendant had failed to make out a case under O 16 of the RHC against the third party. In the circumstances, the third party notice ought to be struck off with costs.

ANALYSIS

[17] I was only concerned with encl 36. That enclosure brought into sharp focus the squabbles between two sisters. It was entirely a legal battle between the defendant and the third party.

[18] The defendant argued that the third party was liable to indemnify the defendant for damages because the defendant was now required to pay the plaintiff the sum of RM10,040.18 being stamping fees and registration costs as well as the sum of RM24,500 being liquidated damages. It was emphasised that the defendant would not have been required to pay the plaintiff those

sums had the third party not lodged the private caveat over the said property which resulted in the sale of the said property between the plaintiff and the defendant to become frustrated. It was submitted that the third party had no right to caveat the said property because the third party was clearly in breach of the sale and purchase agreement entered between the defendant and the third party as reflected in exh 'AA–4' of encl 17.

[19] The two new issues as raised by the defendant and as alluded to earlier were not raised, at all, before the SAR. To make matters worse, neither were the two new issues pleaded in any of the defendant's affidavits. In my judgment, these two new issues should not be brought up by the defendant at all. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, the Supreme Court held that where a vital issue was not raised in the pleadings it would not be allowed to be argued and to proceed on appeal. There Jemuri Serjan SCJ speaking for the Supreme Court had this to say (see pp 431 to 432 of the report):

> We need only to refer to three recent cases where this court had to deal with similar issues to illustrate occurrences of lapses on the part of solicitors in the preparation of their pleadings with the resultant dire consequences. We refer to the recent appeal in this court which had occasion to decide the issue whether to allow a new point raised on appeal but not pleaded and argued in the High Court. Inthat case the court was unanimous in its decision to refuse to allow the new point to be argued without calling for fresh evidence. Mohamed Azmi SCJ in delivering the judgment of the court in the case of *Muniandy & Anor v Muhamad Abdul Kader & Ors* [1989] 2 MLJ 416 said at p 418:
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> > Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at p 233:
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> > > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is...
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> Again on the same page the learned judge continued:
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> > In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality. The so-called 'omission' is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and due to the said ground tenancy, they claimed, albeit mistakenly, protection against eviction under the rent control legislation.

In yet another very recent case the same issue fell to be determined by this court. Hashim Yeop A Sani CJ (Malaya) in delivering the judgment of this court quoted *Muniandy*'s case and Mohamed Azmi SCJ's observations quoted above. At p 363 of the judgment the learned CJ said:

> The crucial issue of the application of the doctrine of severance should have been pleaded and argued before the learned judge and it would be wrong in our view to allow the alternative ground of appeal to be argued at this late stage.

See the case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 156. One of the grounds of the dismissal of the appeal by the bank was that the doctrines of severance was not pleaded and argued in the court of first instance. The most recent case where the same subject was discussed is *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287. Gunn Chit Tuan SCJ at p 296 has this to say:

> As regards the tax element it is impossible to assess the reduction to be made for taxation without any or sufficient evidence. Had there been a deduction for tax the amount awarded would of course be less, and following *Daishowa*'s case the amount of damages awarded would have been reduced further. However, as pointed out by Mr Murthi, the question of deduction of income tax was not raised at all before the trial judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability. In the circumstances of this case we would therefore decline to make any further deduction for tax.

All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

[20] That would be trite law. No new point should be entertained by the Court of Appeal or the Federal Court when that new point was not raised nor pleaded nor argued in the High Court. It would certainly be wrong to allow the new point to be argued at a late stage. But, unfortunately, this trite law has been whittled down by the Court of Appeal in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. There Gopal Sri Ram JCA, writing a separate judgment, said at p 739 of the report:

> In my judgment, the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[21] The phrases 'where the interests of justice so require' and 'where the justice of the case lies' have been used to widen the scope of admitting a new point that was not previously raised in the court of first instance. Of course, I am bound by the decision of the Court of Appeal. The principle of *stare*

decisis must be religiously adhered to. Fortunately, the Court of Appeal in *Luggage Distributors* by a unanimous decision disallowed the appellant's application to admit fresh evidence on the ground that failure on the part of the appellant to raise the delay point at the court of first instance had deprived the respondent of an opportunity to offer rebuttal evidence.

[22] It was rightly argued, in the context of encl 36, by Mr Asmuni bin Awi, the learned counsel for the third party, that to allow the defendant to raise the two new points at this appellate stage would amount to a deprivation of natural justice in that the third party would not be able to rebut the two new points by way of affidavit evidence.

[23] As I see it, the third party's case may simply be stated as follows. That both the defendant and the third party had concluded an oral agreement for the sale and purchase of the disputed property somewhere in June 2001 for the purchase price of RM150,000. The third party had paid the deposit. The third party too had made part payment of the sum of RM80,000 on two separate occasions. One was on 11 June 2001 for the sum of RM50,000; and the other was on 12 July 2001 for the sum of RM30,000. All these payments were not disputed and they were acknowledged by the defendant. Both the defendant and the third party then attended and executed a formal agreement somewhere in the month of February and in the year 2002. This was at the law office of M/s Zulfikri Ulul Azmin & Co and that the date 22 July 2002, so it seemed, was only put in for stamping purposes. On that day, the defendant had also deposited an original title deed of the said property. Later, the third party was informed by the solicitors that on 4 February 2002 the defendant had taken the original title. Subsequent attempts by the third party and her solicitors to contact the defendant after 4 February 2002 proved futile. Sensing danger, the third party then instructed her solicitors to proceed with the stamping of the agreement. All these did not deter the defendant from entering a new agreement with the plaintiff on 25 June 2002 — some four months after the defendant took back the original title deed of the said property, without informing the third party or her solicitors in respect of the subsequent sale. On 23 July 2002 a private caveat was entered by the third party in respect of the said property. It must be borne in mind that the third party was only made aware of the sale of the property to the plaintiff sometime in January 2003 after the third party was informed by the contractor who carried out the renovations to the said property. Without further ado, the third party then lodged a police report on 21 March 2003.

[24] Based on the facts, the third party and the defendant had executed a sale and purchase agreement for the sale of the property in question and that the deposit and part payment of the purchase price had been paid by the third party. Thus, it can rightly be said that the third party has registrable interest in the property and this would, in turn, entitle her to lodge a private caveat on the said property as envisaged under s 323(1)(a) of the National Land Code

1965 ('NLC'). The types of persons who may enter private caveats are specified in s 323 of the NLC, But it is ideal to note that not all persons are entitled to enter private caveats. One must have a caveatable interest in the land before one is allowed to lodge the private caveat. The essential requirement, according to s 323(1)(a) of the NLC, is that a person who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest. In *Luggage Distributors*, Gopal Sri Ram JCA aptly said at p 755 of the report:

> To paraphrase s 323(1)(a) of the code, a private caveat may be entered at the instance of any person or body who claims either:
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> (1) the title to land; or
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> (2) any registrable interest in land.
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> The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat.
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> Although the words 'title' and 'registrable interest' are not defined by the code, their meaning may be gathered from the scheme of the code and from the indefeasibility provision, namely, s 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

[25] As a purchaser having a valid agreement would certainly entitle the third party to have a caveatable interest in the land (*Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53). Furthermore, cl 7 of the sale and purchase agreement between the defendant and the third party also gave the third party the right to lodge a private interest to protect her interest over the land. In my judgment, the third party's private caveat was lawfully entered because she has both the caveatable and registrable interests in the land.

[26] To say as was said by the defendant that there was a failure on the part of the third party to pay the balance of the purchase price within the prescribed time was an assertion that was said without regard to the chronology of events. The sale and purchase agreement between the defendant and the third party stipulated that the balance of the purchase price must be paid within four months from date of the signing of the agreement or after two months thereafter. According to the third party the delay was largely due to the defendant who was to be blamed for the delay and who contributed to the delay. Wasthis true? To answer this question, I must narrate the facts, once again. It must be recalled that the defendant had on 4 February 2002 taken back the original title from the solicitors by the name of M/s Zulfikri Ulul Azmin & Co. After that incident, the third party and her solicitors had, on various occasions, tried to contact the defendant to ask for the return of the original title so that they could proceed with completion of the agreement. But, alas, all their attempts failed. This prompted the third party to instruct her solicitors to stamp the sale and purchase agreement on 22 July 2002. This was accordingly

done and on 23 July 2002 the sale and purchase agreement was already stamped and the private caveat was also lodged. Two months later, and that would be on 25 Septemeber 2002, the third party's loan application was approved.

[27] I would answer the question posed earlier in the positive. It was the defendant who was at fault. It was the defendant who should be blamed for the delay when the defendant took back the original title deed and went into hiding after receiving the amount of RM80,000 from the third party. If the defendant did not take back the original title deed, the balance of the purchase price would have been paid well within time. The third party merely took two months after the date of the stamping of the sale and purchase agreement which was on 22 July 2002 to get her loan approved on 25 September 2002. Thus, if the transaction was not delayed by the defendant, the sale could have been completed within the stipulated time. These salient facts would show that if the third party had delayed the transaction it was certainly justifiable. The defendant played an instrumental role in contributing to the delay. Byway of an analogy the case of *Yap Hong Too & Anor v Wong Ah Mei & Anor* [1997] 1 MLJ 545 (FC), should be referred to. There, in a different context, Peh Swee Chin FCJ said at p 550 of the report:

> Similarly by extension of this rule, in an action for specific performance, for a purchaser who comes to court with clean hands, a court of equity can relieve the purchaser against a failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it.

[28] Even assuming for a moment that the third party was in breach of the agreement for her failure to pay the balance of the purchase price within the specified time, which was denied, the agreement between the defendant and the third party for the sale of the property must be construed as voidable in that the defendant must communicate her intention to the third party when the defendant wanted to terminate the agreement. This was not done by the defendant at all. Section 40 of the Contracts Act 1950 enacts that when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee (meaning the innocent party) may put an end to the contract. This statutory definition of discharge by breach appears to exist, side by side, with the position under the common law. Two situations would appear to entitle the innocent party to treat the contract as being discharged under s 40 of the Contracts Act 1950 namely:

(a) the refusal to perform; and

(b) the inability to perform.

[29] And under these two situations, the innocent party has two options to choose from. One, to put an end to the contract; and the other is to proceed with the contract (see *Chua Ngah Chin v Ng Kie En* [1968] 1 MLJ 267). There is another section in the Contracts Act 1950 that needs to be mentioned. It is s 56(1) and it provides that, where time is of the essence of the contract, the

failure to perform within the stipulated time will entitle the injured party to avoid the contract. It is not doubted that the injured party has the vested right not to avoid the contract and could insist on specific performance and then proceed to sue for damages. Lord Hailsham in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 categorically said that s 56(1) of the Contracts Act 1950 should be read together with s 65 of the Contracts Act 1950 which provides and sets out the consequences of rescission of a voidable contract.

[30] Here, in the context of encl 36, the defendant has two options to exercise. One, to terminate the contract. Two, to affirm the contract as still subsisting. If the defendant desires to terminate the contract with the third party, she should communicate it to the third party. In my judgment, the failure on the part of the defendant to terminate the sale and purchase agreement with the third party would render that agreement to be valid, effective and still subsisting. To confound the matter further, the defendant not only failed to communicate with the third party of her purported intention to terminate the agreement, the defendant had the audacity to retain the sum of RM80,000 paid to her by the third party. To date, the defendant still held onto that money. In the circumstances, can the defendant be said to have terminated the agreement while at the same time still holding onto that money and enjoying that money that was paid by the third party? Certainly not. In *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, Salleh Abas FJ laid down the law in these salient words (see p 153 of the report):

> Time being of the essence:
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> In modern law of contract *prima facie* a stipulation as to time is not of the essence of a contract, unless the parties agree that it be so. (See Lord Simon of Glaisdale in *United Scientific v Burnley Council* [1978] AC 904, at pp 940 and 944). In this case as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition would entitle the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See 9 *Halsbury's Laws of England* (4th Ed) para 538, p 370).
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> In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing.

[31] Perhaps the effect of the failure to perform within a specified date was succinctly said by Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 218:

Time being of the essence of the provisions in the sale agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end.

[32] Here, as alluded to above, the defendant did not elect to treat the contract with the third defendant as coming to an end.

[33] Next, the issue as to whether the defendant has made a proper case to enable her to claim for indemnity and contribution from the third party. Itmust be emphasised that the defendant had entered into another sale and purchase agreement with the plaintiff without terminating the existing sale and purchase agreement with the third party. It can be surmised, with respect, that the defendant has committed a fraudulent act against the plaintiff by misrepresenting to the plaintiff into believing that she had a good title to the property to pass to the plaintiff. The third party should not be made responsible for the defendant's fraudulent conduct. There was simply no reasonable cause of action between the plaintiff and the third party. Pure and simple, it was an abuse of the process of the court and it should not be entertained. In the same vein, Ajaib Singh J had this to say in the case of *Dato Seri Dr Mahathir bin Mohamad v Derek Davies & Anor* [1989] 1 MLJ 52 particularly at p 53 thereto:

> The Minister of Home Affairs and the government of Malaysia cannot be brought in as third parties as there is no nexus between them and the plaintiff.
>
> And there is also no reasonable cause of action which the plaintiff or the defendants can maintain against the Minister of Home Affairs and the government of Malaysia.
>
> The third party procedure invoked by the defendants is misconceived. It is an abuse of the process of the court and cannot be sustained. The defendants' application is clearly an attempt to embarrass the Prime Minister and prejudice the fair trial of his suit which he has brought against the defendants.
>
> The application is dismissed with costs.

[34] I must hold and it was part and parcel of my judgment that the defendant was contractually bound by the terms and conditions as stated in the sale and purchase agreement between the defendant and the third party for the sale of the property in question for the sum of RM150,000. I must reiterate that the failure on the part of the defendant to communicate her purported intention to terminate the sale and purchase agreement and to refund the deposit and part payment of the purchase price to the third party was an indication — nay a strong indication that the defendant intended to proceed with the completion of the sale and purchase agreement.

[35] It was feebly argued that the defendant's action of taking back the original title deed was indicative of her intention to terminate the sale and purchase agreement. But under the Contracts Act 1950, termination of any contract has to be communicated. Furthermore, the defendant must be estopped

from denying the existence of the sale and purchase agreement with the third party. As a rule of evidence, estoppel would certainly operate against the defendant (*Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha* (1935) LR 62 Ind App 100 at p 108). In statutory form, estoppel is set out in s 115 of the Evidence Act 1950 and it is worded in this way:

> 115 Estoppel
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.
>
> Illustration
>
> A intentionally and falsely leads B to believe that certain land belongs to A and thereby induces B to buy and pay for it.
>
> The land afterwards becomes the property of A and A seeks to set aside the sale on the ground that at the time of the sale he had no title.
>
> He may not be allowed to prove his want of title.

[36] Basically, estoppel operates to prevent a party in a litigation to deny asserting certain facts. The defendant here cannot deny that she had entered into the sale and purchase agreement with the third party in regard to the said property. Any denial by the defendant would trigger the estoppel doctrine.

[37] At the end of the day, the available evidence leaned in favour of the third party. I must reiterate the following factual matrix. That, at all material times, it was agreed by both the defendant and the third party that the purchase price of the property was RM150,000. This was clearly stated in the sale and purchase agreement. That the defendant's contention that the purchase price was RM250,000 by merely looking at exh 'AA–7' which was the third party's letter of offer dated 25 September 2002 was indeed misleading. The defendant might have been confused or misunderstood the Islamic concept of banking transaction under the principle of Al-Bai Bithamin Ajil. Under that Islamic concept, the bank will purchase the property from the customer in the sum of RM125,000 and will then sell it back to the purchaser at the sale price of RM243,515.66. In other words, the sum of RM243,515.66 made reference to the full amount that the third party shall pay back to the bank. The difference between RM125,000 and RM243,515.66 would be RM118,515.66 and the latter amount constituted the profit of the bank from the transaction.

[38] Now, the facts in the present appeal can readily be distinguished from the facts in *Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177, a decision of the Privy Council with a coram of Lord Atkinson, Lord Shaw, Lord Wrenbury, Lord Carson, and Sir Robert Younger. There the facts may be stated as

follows. The owners of a wharf granted the appellant company the right to berth their ships at it subject to payment and liability for any damage caused. The respondent, who was the managing director of the appellant company, gave instructions, without the company's authority, that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was unloaded the wharf collapsed. Inan action by the owners of the wharf against the appellant company for damages, they served a third-party notice upon the respondent and claimed that he should indemnify them against any damages for which they should be held liable. ByO XVL r 48 of the Rules of the Supreme Court, third party procedure would be available 'where a defendant claims to be entitled to contribution or indemnity over against a person'. It was held that the appellant company had a right of indemnity against the respondent and were entitled to join him as a third party and obtain relief against him. Lord Wrenbury delivered the judgment of the Privy Council and his Lordship at pp 182 to 183 of the report laid down the law in these salient terms:

> The question for discussion is therefore whether upon the facts stated the appellants have as against Beng Kee a right of indemnity. There is no other question.
>
> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v Ward* 1 Ves 332, 336; a case of vendor and purchaser) in cases in which the court will 'independent of contract raise upon his (the purchaser's) conscience an obligation' of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co v London and North Western Ry Co* 34 Ch D 261.

[39] Continuing at pp 184 to 185 of the report, Lord Wrenbury had this to say:

> In the present case, suppose that it would have taken, say, a month to discharge the Kamakata Maru at the wharf and that the Eastern Shipping Company had learned, say, three days after the ship was berthed that the breach of duty had been committed, an action would have lain to restrain the defendant from continuing the ship at the berth and for an order that he do indemnify the plaintiffs against the three days' rental that had been incurred.
>
> In their Lordships' opinion these results follow from the following considerations. If Beng Kee as managing director had been granting to a third party the right to berth a ship at the wharf it would have been his duty to his principals to stipulate

that the third party should accept the burden which would be cast upon his principals by the user of the wharf. What happened was that Beng Kee as managing director gave to himself, as charterer of the ship, the user of the wharf. He cannot be heard to say that in so doing he did not, as managing director, require from himself as charterer of the ship the same promise as that which it would have been his duty to require from a third party — namely, a promise that he would indemnify his principals against the consequences of his act. In other words, the relations between the parties were such that the law implies the promise which it was his duty to make, and from this arises a right of indemnity. Upon these grounds their Lordships are of opinion that this appeal succeeds.

There should be a declaration that Quah Beng Kee is liable to indemnify the Eastern Shipping Company against or to repay to them the damages awarded to the P&O Company by the order made in the action as well as all costs ordered to be paid by them in the several orders for costs made in the action and in the third-party proceedings, and is liable to pay to the Eastern Shipping Company the costs incurred by them in the action and in the third party proceedings, the costs incurred by them in the action to be taxed as between solicitor and client, but having regard to the fact that they are payable by the third party, and an order to give effect to that declaration. The respondent must pay the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

[40] Factually speaking, the respondent (third party) in *Eastern Shipping Co Ltd v Quah Beng Kee* knew about the transaction between the owner of the wharf and the appellant because the respondent (third party) was the managing director of the appellant's company. There was thus an element of knowledge between the respondent (third party) and the appellant about the transaction of berthing the ships at the wharf because the respondent (third party) was the managing director of the appellant company. Although Lord Wrenbury did not expressly state in his judgment but it can be surmised from a reading of his Lordship's judgment that the element of knowledge was a vital factor in order to claim contribution from the respondent (third party) in the third party proceeding. In sharp contrast, the third party in the present appeal knew nothing about the subsequent sale of the property to the plaintiff. The third party was only made aware of the sale of the property somewhere in January 2001 after being informed by the contractor who carried out the renovation to the property by which time the transfer of the property to the third party was completed and the defendant had no more good title over the property to enable her to pass that property to the plaintiff.

[41] Reliance by the defendant on the case of *Lee Kuan Yew v Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties)* [1993] 1 SLR 723 was also misplaced. There the facts were also different from the facts in the present appeal. There the Straits Times Press ('STP') published an interview with the defendant in May 1988 on the defendant's views on the contents of a statutory declaration made by one Francis Seow. The plaintiff responded to the interview by issuing a statement which STP published. The defendant replied to the

plaintiff's statement which was then published on 23 May 1988. The plaintiff then sued the defendant for damages for alleged libel in respect of the statement published on 23 May 1988. The defendant then claimed an indemnity and contribution from STP by joining them as a third party. STP then applied to set aside the third party notice and the application was set aside by the SAR. The third party appealed and the appeal was dismissed by LP Thean J. This was what his Lordship held (see the headnotes at p 724 of the report):

> (3) It could not be disputed that when the defendant requested STP to collect his press statement on 22 May, he had intended it to be published by STP on the following day or soon thereafter. The publication of the content of the press statement therefore was made with the defendant's consent but such consent was not a complete answer to the defendant's claim against STP as STP was under no obligation to publish it and the decision to publish it rested solely with STP. STP decided to publish it because they considered it a newsworthy item of continuing public interest.
>
> (4) The publication by STP on 23 May 1988 was a re-publication of the defendant's press statement and if the press statement was held to be a libel, then the publication by STP was equally a libel. As such both the defendant and STP are tortfeasors under s 11(1)(c) of the Civil Law Act (Cap 43, 1988 Ed) and the question of the defendant's claim for contribution will arise for the court's consideration,
>
> (5) As between the defendant and STP there was no relationship of principal and agent; there was no contractual relationship at all between them in respect of the publication by STP on 23 May. Itwas also not tenable that an implied contract to indemnify STP arose from the 'request' made by the defendant to publish his press statement.
>
> (6) In the circumstances, there was a question proper to be tried as to the liability of STP to make the contribution or indemnity claimed.

[42] Clearly from the facts, STP (third party) knew about the transaction which arose between the plaintiff and the defendant because STP (third party) was involved in publishing the press statement. The court rightly held that there was a question proper to be tried as to the liability of STP (third party).

[43] The case of *Hong Leong Nominees Sdn Bhd & Anor v Tommy Lim Boon Cheow & Anor (Lachaman Lalchand & Associates, third party)* [2000] 5 MLJ 96 too can readily be differentiated from the present appeal. There, the first defendant had instructed his solicitors to write to the plaintiffs setting out his grievances against them. The solicitors wrote letters to the plaintiffs and extended copies of the letters to a few parties, among others Bank Negara, the Securities Commission and the police. The plaintiffs brought an action for defamation against the first defendant and their solicitors as second defendant. After the trial commenced, the plaintiffs and the second defendant reached a settlement

and the action against the second defendant was withdrawn. When the plaintiffs proceeded with the action against the first defendant, third party proceedings were taken against the second defendant. The third party (second defendant) then applied to set aside the third party directions contending, inter alia, that the first defendant had not made out a proper case for the court to grant third party directions and that as the third party (second defendant) was acting in their capacity as agents on behalf of its principal, namely, the first defendant, and pursuant to s 10(1)(c) of the Civil Law Act 1956, the third party (second defendant) should instead be indemnified by the first defendant.

[44] The court dismissed the third party's application. The court held as follows (see the headnotes at pp 96 to 97 of the report):

(1) The first defendant in seeking third party directions had to show that there was a question proper to be tried as to the liability of the third party for a contribution or an indemnity claimed in the present action. If a prima facie case was made out, then the third party must show special circumstances why the directions should not be given.

On the facts, the solicitor-client relationship gave rise to relevant issues that needed to be tried and the publication of the letters by the second defendant formed the crux of the plaintiffs' suit. Nofurther pleadings were necessary on the third party directions as the pleadings filed were adequate. The first defendant needed only to seek for an order for third party directions that the second defendant participated in the proceedings of the main suit, and at the conclusion of the main suit, if liability was found against the first defendant, then such liability and its extent of indemnity and contribution, if any, against the third party will be determined as well. Further, the second defendant had not shown any special circumstances why the third party directions should not be given (see pp 103 E–F, 104 C, 105C–E).

(2) The third party's contention that their relationship with the first defendant of solicitor-client was an agent-principal affair called for the court to examine whether the third party was acting within the authorised acts of the first defendant in the trial of the main suit. As such, the later part of s 10(1)(c) of the Act, namely that, 'no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought', did not apply to the present set of facts (see pp 105F, I –106A).

[45] Now, the third party in *Hong Leong Nominees*' case knew about the transaction between the plaintiff and the defendant because the third party was the solicitor who published the defamed letters which resulted in the defamation suit being filed by the plaintiff. There was, in fact, knowledge on the part of the third party regarding the transaction in the defamation suit. The third party notice was taken against the solicitor by the defendant based

on one transaction which was well known by all parties which resulted in the defamation suit being taken out by the plaintiff. In sharp contrast, the third party in the present appeal neither participate in the transaction between the defendant and the plaintiff (in relation to the sale of the property to the plaintiff by the defendant which has resulted in the proceeding being taken out by the plaintiff in the main suit) nor has the third party had any information or knowledge regarding the transaction until January 2001. Thus, there was no connection between the third party with the defendant and the plaintiff which would entitle the defendant to claim contribution for indemnity from the third party.

[46] In the present appeal too, the third party has no knowledge of the contract between the defendant and the plaintiff. The same would also be true for the plaintiff. The plaintiff did not know of the existence of the previous contract between the defendant and the third party. In such a situation, it would be difficult to relate the issue in the main suit filed by the plaintiff to the third party. To aggravate the matter further, all the documents showed that the defendant had never disclosed the identity of the third party to the plaintiff and vice versa.

[47] In my judgment, the duty on the part of the defendant was onerous. The defendant has to prove to the court that the third party notice was filed within the scope of O 16 r 1 of the RHC. In the context of O 16 of the RHC, the defendant has to satisfy the court that there was a question proper to be tried as to the claim for contribution from the third party as required under the provisions of the RHC. There was a failure on the part of the defendant to prove a *prima facie* case against the third party. The defendant too has failed to prove the existence of any connection between the plaintiff and the third party as well as the existence of any knowledge on the part of the third party in regard to the suit filed by the plaintiff or the transaction entered into between the defendant and the plaintiff.

CONCLUSION

[48] For the reasons as adumbrated above, I dismissed the appeal in encl 36 with costs.

Appeal dismissed with costs.

Reported by Peter Ling